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In the United States Court of Appeals
For the Seventh Circuit

No. 12169

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-Appellant,
vs.
CHICAGO UNION STATION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Trial Judge.

APPELLEE'S BRIEF AND APPENDIX.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12169

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff-Appellant, vs. CHICAGO UNION STATION COMPANY, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Trial Judge.

APPELLEE'S BRIEF.

I.

STATEMENT OF FACTS.

A. NATURE OF THE CASE.

This action was brought by plaintiff as a subrogee of one Harry L. Mintz to recover damages for the loss of certain jewelry. Harry L. Mintz had delivered two traveling bags containing jewelry claimed to be worth approximately $34,000 to defendant's Red Cap without informing the Red Cap of the unusual value of the contents. Subsequently the sample cases were stolen from the Red Cap by a thief who posed as Mintz' brother. The case was tried

by the court. The court found for the defendant and entered findings of fact and conclusions of law. Plaintiff filed its motion to set aside the findings of fact, conclusions of law, and the judgment order and moved the court to enter judgment for the plaintiff. In the alternative, plaintiff also filed its motion for a new trial.

B. STATEMENT OF THE FACTS.

The summary of facts in plaintiff's Brief is misleading and inaccurate. The facts are summarized as though the court below found in favor of appellant and in some cases the summary contradicts the findings of the trial judge.

Harry L. Mintz, a jewelry salesman and an experienced traveler, arrived at Union Station intending to board a train to Minneapolis. He had with him two cases containing jewelry, as well as a personal bag. Mintz delivered the three bags to a Red Cap and received baggage checks for them. Mintz never told the Red Cap that the bags were valuable or that they contained a fortune in jewelry. Moreover, Mintz did this knowing that the Red Cap would be forced to leave the bags unattended while delivering the bags to the various cars of the train to which he was making deliveries (App. 41). Mintz left the Red Cap and boarded the train. Some time after Mintz had left, a man came up to the Red Cap and said to him, "We are not making the trip by train", and that they were going to drive to St. Paul or Minneapolis. The Red Cap asked who wasn't making the trip and the man said, "These three bags", and he pointed out Mintz' bags (App. 75). The Red Cap told the man that he couldn't turn over the bags without the claim checks and without the return of the claim checks the bags would have to go to St. Paul, where they could be picked up. The Red Cap said further that he would be ten more minutes loading this train: that

if the stranger didn't return by that time with the claim checks, the bags would be down at the train (App. 76).

Three to five minutes later the same man returned and said that they were in a hurry. The Red Cap asked where the claim checks were. The man said his brother was just finishing a telephone call, and that he would be there. He asked if the Red Cap would please put the bags in a cab for him. The Red Cap took Mintz' bags to the cab court and placed the big bag in a cab standing there. The Red Cap and the stranger then stood and awaited the arrival of Mintz with the claim checks. The stranger just stood there looking into the station as though he, too, were awaiting Mintz (App. 77). Then the Red Cap heard his name or his number called and he was told to hurry as the train would be in any minute, and it was getting close to departure time. He had no alternative but to seek help, either somebody to watch Mintz' baggage or somebody to take the other baggage to the train so that he could remain with the man (App. 77). The Red Cap stepped through the nearby double doors to the station looking for help; and as he did so, he heard the motor of the cab. He turned around and saw the cab pulling away (App. 77).

The Red Cap was never told that the bags contained anything of unusual value (App. 73-74). He was astonished when he found the bags contained jewelry (App. 87-88).

Although Mintz testified at the trial that he told the Red Cap that his bags were valuable, it developed that in two statements made by Mintz shortly after the loss he never said that he had told the Red Cap that the bags were valuable. The trial court held that Mintz had never told the Red Cap of the value of the bags.

Defendant's Red Caps held themselves out to the public for the carriage of traveling bags to and from cars (App.

13). It is, of course, common knowledge that Red Caps are supplied for the handling of personal baggage.

Mintz contended that the amount of jewelry lost was $34,605.88. However, the evidence showed that shortly after the loss he filed a claim with his insurance company in which he stated that his total inventory at the time of the loss was $21,844.92 (App. 50, 136). Mintz relied for his proof of loss upon a document prepared by him after the loss had occurred.

SUMMARY OF ARGUMENT.

Defendant's Red Caps held themselves out to the traveling public for the handling of bags containing personal property or baggage (App. 13; Appellee's App. 2a).

Mintz never informed defendant's Red Cap that his baggage contained items of unusual value (App. 73-74, 93); defendant's Red Cap did not know that the bags contained anything of unusual value (App. 87-88).

Defendant was not a bailee for hire of the contents of Mintz' sample cases.

The legal fraud of Mintz in failing to disclose the unusual value of the contents of his sample cases precludes recovery here.

There was no voluntary misdelivery by defendant's Red Cap to a person not entitled to receive the bags; the bags were stolen from the Red Cap (App. 75-77, 94).

Assuming a misdelivery, plaintiff cannot recover because of the contributory negligence of Mintz in failing to disclose the contents of the sample cases.

Mintz was guilty of gross negligence which contributed to the loss of the sample cases in failing to inform the Red Cap of the unusual value of the contents.

Since both plaintiff and defendant tried the case below on the theory that the law of the State of Illinois was controlling and that the case was governed by the law of bailment and not the law of carrier and passenger (Appellee's App. 1a, 2a), that theory is the law of the case. Hence, the Interstate Commerce Act is inapplicable on this appeal.

Defendant is not a carrier within the meaning of the Interstate Commerce Act. No issue of limitation of liability is involved in this case since no tariff was pleaded or proved. The common law and not the Interstate Commerce Act is controlling.

Under the common law defendant was not the insurer of the contents of Mintz' sample cases since those contents were never received by defendant. Mintz' legal fraud precludes recovery in this case.

The evidence is insufficient to establish the amount of plaintiff's loss.

THE CONTESTED ISSUES.

I.

Was defendant a bailee for hire of the contents of Mintz' sample cases?

II.

Did the actions of defendant's Red Cap in retaining control of the sample cases, although placing them in a taxi cab, while waiting for the appearance of Mintz, constitute a misdelivery?

III.

Did the failure of Mintz to tell the Red Cap that his sample cases contained a fortune in jewelry influence the Red Cap to place the bags in a position from which they could be stolen?

IV.

Since plaintiff admitted in the court below and tried the case on the theory that the law of the State of Illinois was controlling, is it not the law of the case that the law of Illinois controls?

a. Even if the law of Illinois is not the law of the case, is defendant a carrier under the Interstate Commerce Act?

b. Since no tariff was pleaded, is not the common law of liability as it existed prior to 1906 applicable herein; since no limitation of liability was sought, is not the Carmack Amendment inapplicable?

c. Is a carrier required to make inquiry as to the nature and value of property handled by its Red Caps?

V.

Is not the plaintiff barred from recovery herein by the legal fraud of Mintz in failing to disclose the fortune in jewelry carried by him?

II.

PROPOSITIONS OF LAW.

I.

Defendant was not a bailee for hire for the contents of Mintz' sample cases.

Michigan Cent. R. R. Co. v. Carrow, 73 Ill. 348, 355, 359, 24 Am. Rep. 248 (1874).

Crosby v. 20 Fifth Avenue Hotel Co., 173 Misc. 604, 17 N.Y.S. 2d 498 (1940).

Stuart v. D. N. Kelley & Son, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Barnette v. Casey, 124 W.Va. 143, 19 S.E. 2d 621, 623, 624 (1942).

Drybrough v. Veach, 238 S.W. 2d 996, 997 (Ky. Ct. App. 1951).

Corpus Juris Secundum, Vol. 8, p. 249 (Bailments, sec. 15).

II.

There was no misdelivery by defendant's Red Cap of Mintz' cases; nor, assuming a misdelivery, is there any liability on defendant in the circumstances of this case.

Hartley v. Robinson, 78 Ga. 594, 51 S.E. 2d 617, 618 (1949).

Crosby v. 20 Fifth Avenue Hotel Co., 173 Misc. 604, 17 N.Y.S. 2d 498 (1940).

Roger Wurmser, Inc. v. Interstate Hotel Co. of Neb., 148 Neb. 660, 28 N.W. 2d 405, 407 (1947).

I. & St. L. R. R. Co. v. Herndon, 81 Ill. 143, 149 (1876).

Stuart v. D. N. Kelley & Son, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Barnette v. Casey, 124 W.Va. 143, 19 S.E. 2d 621, 623, 624 (1942).

Corpus Juris Secundum, Vol. 8, p. 249 (Bailments, sec. 15).

III.

Mintz was guilty of gross negligence which caused the loss of the sample cases.

I. & St. L. R. R. Co. v. Herndon, 81 Ill. 143, 149 (1876).

Roger Wurmser, Inc. v. Interstate Hotel Co. of Neb., 148 Neb. 660, 28 N.W. 2d 405, 407 (1947).

IV.

The law of the case is that the law of the State of Illinois is controlling and, hence, the Interstate Commerce Act has no application to the case at bar.

See Argument.

a. **Defendant is not a carrier as defined in the Interstate Commerce Act.**

Horelick v. Pennsylvania R. R. Co., 24 N.J.S. 413, 94 A. 2d 685 (1953), aff'd 13 N. J. 349, 99 A. 2d 652.

b. **The Interstate Commerce Act is inapplicable where no tariff is relied upon; there is no attempt by the defendant to "limit liability" in this case.**

Corpus Juris Secundum, Vol. 13, p. 182 (Carriers, sec. 94).

Nothnagle v. N.Y.N.H.&H. R.R. Co., 346 U.S. 128, 133 (n. 7) (1953).

York Co. v. Central R. R., 70 U.S. 107 (1865).

c. Defendant had no obligation to inquire into the nature and value of the contents of Mintz' sample cases.

Nothnagle v. N.Y.N.H.&H. R.R. Co., 346 U.S. 128, 133 (n. 7) (1953).

Michigan Cent. R. R. Co. v. Carrow, 73 Ill. 348, 350, 24 Am. Rep. 248 (1874).

Humphreys v. Perry, 148 U.S. 627 (1893).

III.

ARGUMENT.

Although plaintiff in stating the Nature of the Case contends that its appeal is both from the order denying plaintiff's motion for the entry of judgment in its favor, and from the order denying plaintiff's motion for a new trial, its argument seems to be confined to a contention that plaintiff is entitled to judgment as a matter of law. In the conclusion of its Brief, plaintiff asks only that judgment be entered in its favor. Since plaintiff has not argued that it is entitled to a new trial, defendant assumes that that point has been waived. Furthermore, although plaintiff lists as a contested issue whether the evidence was sufficient to establish the amount of plaintiff's loss, no argument is made on that point. Again defendant assumes that the point has been waived.

The case was tried below by both plaintiff and defendant on the theory that the law of the State of Illinois was controlling and that the general law of bailment applied. Both plaintiff and defendant expressly repudiated any claim that the Carmack Amendment of the Interstate Commerce Act was applicable to this case (Appellee's App. 1a, 2a). The theory on which the case was tried below is the law of the case and is controlling.

Under the law of bailment, in order for the plaintiff to recover, there must be shown the creation of a bailment, a loss of the bailed article, negligence of the bailee which caused or contributed to the loss and finally, freedom from negligence contributing to the loss on the part of the bailor and freedom from fraud. 8 C.J.S. Bailments, Secs. 15, 26; *Roger Wurmser, Inc.* v. *Interstate Hotel Co. of Nebraska*,

148 Neb. 660, 28 N.W. 2d 405, 407 (1947); *Michigan Central R.R. Co. v. Carrow*, 73 Ill. 348, 360 (1874).

I.

Defendant was not a bailee for hire for the contents of Mintz' sample cases.

In insisting that defendant was a bailee for hire plaintiff relies upon a passage in 6 *American Jurisprudence*, Sec. 72, p. 2281, and cites in support of the proposition three irrelevant cases.

The author of the note in *American Jurisprudence* asserts that the larger number of "the more recent decisions" support the view that the bailee of a sealed receptacle is the bailee of its contents even though those contents are unusually valuable and no disclosure has been made to him. This assertion is evidently a carryover from Ruling Case Law. An examination of the cases relied upon by the author fails to reveal any support for this proposition except for a few safety deposit cases and innkeeper cases. Indeed, *American Jurisprudence* points out in paragraph 73 that there is opposition to the view advanced by the writer. The cases in support of that opposition are not only later but much better reasoned than the so-called "more recent decisions". Indeed, the view that there is not a bailment of the contents appears most recently in *Stuart v. D.N. Kelley & Son*, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954). It is apparent that the footnotes in *American Jurisprudence* do not support the view advanced in the text.

The criticism of a text such as *American Jurisprudence* is not lightly to be entered upon. However, an explanation of the textual error probably lies in the fact that the writer failed to realize the distinction between bailees who are

ing and bailees whose course of business is limited to articles of no great intrinsic value. Thus, the writer in *American Jurisprudence* relies upon cases involving safety deposit boxes in banks and safes in inns and hotels for the proposition that the bailee has accepted the bailment of the contents of those receptacles. Obviously, there is a clear distinction between a bailee who holds himself out for the deposit of articles of unusual value such as banks and innkeepers and a bailee of baggage of passengers. It serves no useful purpose to tell a bank that an article of great value has been stored in the safety deposit box for it is exactly that purpose for which safety deposit boxes are designed. On the other hand, it is of the utmost importance to inform a Red Cap that a traveling bag contains articles of unusual value since both the method of operation and the degree of protection afforded bags by a Red Cap are not designed for articles of unusual value. The record in this case shows that Red Caps must leave bags unguarded as they perform their duties. Harry Mintz knew this (App. 41). Red Caps are not accustomed to functioning as Brinks' guards.

The distinction between bailments directed to articles of great value and those of ordinary value was not missed in *Corpus Juris Secundum* in which it is stated in Volume 8 at p. 249 (Bailments, sec. 15):

> "Since, except as the rule may be modified in the case of special relationships, such as those of common carriers, innkeepers, or warehousemen, as appears in the titles Carriers, Innkeepers, and Warehousemen and Safe Depositaries, respectively, the duties and responsibilities of a bailee cannot be thrust on a person without his knowledge or consent, or against his protest, it is essential to a bailment that there be an *acceptance* of the subject matter by the bailee." (emphasis added)

To avoid a mere pitting of *Corpus Juris Secundum* against *American Jurisprudence* it should be pointed out that there are many cases overlooked by *American Jurisprudence* which, in the absence of special relationship, hold that a bailee of a receptacle is not a bailee of undisclosed contents, either of unusual value or whose presence is not to be anticipated.

Crosby v. *20 Fifth Avenue Hotel Co.*, 173 Misc. 604, 17 N.Y.S.2d 498 (1940).

Stuart v. *D. N. Kelley & Son*, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Drybrough v. *Veach*, 238 S.W. 2d 996, 997 (Ky. Ct. App. 1951).

Barnette v. *Casey*, 124 W.Va. 143, 19 S.E. 2d 621 (1942).

In the *Crosby* case the court said (17 N.Y.S.2d at p. 499):

> "A hotel is not chargeable as a bailee for a valuable antique left in a trunk where plaintiff did not give notice that the trunk contained anything but ordinary personal luggage. *Waters* v. *Beau Site Co.*, 114 Misc. 65, 186 N.Y.S. 731; *Magnin* v. *Dinsmore*, 62 N.Y. 35, 20 Am. Rep. 442."

In the *Stuart* case, the plaintiff sought to recover for articles of clothing left on a boat. In denying recovery the court said (117 N.E. 2d p. 162):

> "'A bailment is essentially a consensual transaction arising out of a contract express or implied * * * and there must be an acceptance by the bailee of the goods forming the subject-matter of the bailment before there can be any bailment. * * * It is plain the law does not thrust upon one the liabilities of a bailee without his knowledge or consent, and equally obvious that while an acceptance may be implied the law will not infer such until there is something to show notice or

knowledge of the alleged bailee that the goods are in fact in his possession.'

• • •

It would seem, despite intimations to the contrary, that knowledge or consent on the part of the bailee is no less essential to the creation of a gratuitous bailment than to the creation of a bailment for hire. We hold only that there was no bailment for hire here of the property in question and that is sufficient to dispose of the case, for the plaintiff concedes that proof of a bailment for hire is essential to recovery."

In *Barnette* v. *Casey*, 124 W.Va. 143, 19 S.E. 2d 621, 623, 624 (1942), suit was brought to recover for a fur coat stolen from a bailed automobile. In denying recovery the court made clear that the contents of a bailed article would not be part of the contract of bailment unless the bailee could reasonably expect the contents to be in the receptacle or unless he were given notice of their presence. The court said:

"We do not think that, in this instance, the bailee was called upon to assume that there was any property in the automobile other than the tools, tires, etc., which *might reasonably be expected to be carried therein.* (at p. 623)

• • •

"In some circumstances involving property stolen from bailee, or lost through his negligence, the bailee has been held liable. Woodruff v. Painter, 150 Pa. 91, 24 A. 621, 16 L.R.A. 451, 30 Am.St.Rep. 786, was a case where a customer in a shop engaged in making a purchase was invited to lay aside his wearing apparel which contained a watch, an article customarily carried, and the storekeeper was held for its negligent loss. This rule was later applied in Hunter v. Reed, 12 Pa. Super. 112, but in that case *a diamond ring, not designed to be carried in the fob pocket of a pair of trousers, was held to be outside the rule.* (at p. 624)

• • •

> For example, he would be charged with constructive knowledge that a piece of baggage probably contained property of some value, although he might not know the particular type of property or the value thereof, contained therein. He probably would not, in the absence of actual notice, be liable for *extremely valuable property such as jewelry, or a type of property not ordinarily carried as baggage and left in a vehicle.*" (at p. 624) (emphasis added)

Defendant submits that the above cases are dispositive of the issues in this case. Somehow or other those seemed to have been overlooked both by the writer of the article in *American Jurisprudence* and the plaintiff. It is clear that a bailee for hire is not a bailee of the contents of a sealed receptacle in the absence of notice of the unusual value of the contents.

It is a distortion of the record to imply that defendant's Red Cap knew that Mintz' sample cases contained valuables simply because he recognized them as sample cases. The Red Cap assumed that the bags were sample cases and assumed that they were valuable to Mintz as samples in the way that tooth brushes would be valuable to a tooth brush salesman. The Red Cap was surprised that jewelry would be carried in sample cases like this (App. 87, 88).

The plaintiff has cited two Illinois cases in support of its proposition that the bailee of a sealed receptacle is the bailee of the contents. These are:

> *National Safe Deposit Co.* v. *Stead*, 250 Ill. 584 (1911).
>
> *Sadler* v. *National Bank of Bloomington*, 403 Ill. 218, 229-30 (1949).

The *Stead* case is not an action for loss of the contents of a bailment. Nothing more was decided in that case than

that a bailment was created between a safe deposit company and its lessee. Since both the *Stead* and *Sadler* cases involved the contents of safe deposit boxes, it is quite apparent that they set forth a sound rule of law. Defendant has already pointed out the distinction between bailments which it is anticipated will involve valuable articles and bailments where there is no such anticipation. Even the dictum in the *Stead* case is unexceptional; it does not refer to a situation where items of unusually great and unanticipated value are contained in the receptacle.

The law in Illinois governing the bailment of baggage is that set forth in *Michigan Cent. R. R. Co.* v. *Carrow*, 73 Ill. 348. The facts in that case are almost on all fours with the instant case. Although the action involved a carrier and a passenger the court was also asked to apply the Illinois law on bailments. Because it is the leading case in Illinois, and much cited elsewhere, we take the liberty of quoting from it in unusual length. The Court said at pp. 355 and 359:

> "Nor do we see how appellant can be held liable in this case, as a bailee for hire. The company entered into no such agreement with appellee, either expressed or implied. The contract with him was simply to carry him as a passenger, and his personal luggage. It was not bound to carry anything he might choose to bring with him as baggage, no matter how costly or delicate in structure, or how much attention would be required for its safe carriage.
>
> "As was said in the *Chicago and Cincinnati Air Line Railroad Co.* v. *Marcus, supra*, [38 Ill. 219] 'When a person, therefore, under the pretense of having baggage transported, places in the hands of the agents of a railroad, merchandise, jewelry and other valuables, without notifying them of its character, he practices a fraud upon the company.'

"There is no pretense for saying that any of the employees on the train, or the agent who received and checked it, had the slightest knowledge the trunk contained anything else than baggage proper. Had appellee disclosed to the baggage-master, at the depot, the fact his trunk contained $30,000 worth of jewelry, it would have been his duty to reject it. He, no doubt, would have been told it was express matter, and not baggage. This important fact was not divulged. It was all-important to the carrier, as indicating the amount of risk it was about to assume. Appellee himself having treated it as baggage, and not as merchandise of extraordinary value, the company was authorized to do the same. Any other rule would permit the passenger to practice an imposition upon the carrier.

"Appellee could not make the company bailee of goods, as for hire, without its consent. Story on Bailments, sec. 60; *Lethbridge* v. *Phillips*, 2 Starkie, 544.

"It is inconceivable the company would have received this trunk at all, had its contents been made known. It had no means of taking proper care of packages of such unusual value. The servants employed in charge of the baggage-car, had not been employed with a view to place in their charge property of that character. It was such property as was usually sent by express. The proof shows there was another trunk in the car that was consumed, that contained $21,000 worth of watches and jewelry.

"No compensation was paid by appellee for the transportation of this valuable property. His passage fare was only for the carrying of himself and his personal baggage that was contained in the trunk. Without attributing any sinister motive to appellee, we can regard this transaction in no other light than an attempt to have this large amount of property carried free of charge, contrary to the known custom of the company.

"It makes no difference that others may have had some valuable merchandise carried as baggage, perhaps with the knowledge of the company. If such was the fact, it was wrongful, because in contravention of the established rules of passenger carriers. The time has now arrived for determining at whose risk this property was. Whether any fraud, in fact, was intended, it is not necessary to inquire. The transaction was fraudulent in law, and this is sufficient, by all the authorities, to avoid any contract, whether express or implied. The fact appellee offered as common baggage, merchandise of extraordinary value, is a legal fraud, such as will excuse the performance of a contract.

"In *Cahill* v. *The L. and N. W. Railway Co., supra*, [10 C. B. (N. S.) 154] Byles, J., says 'the conduct of the defendant, without imputing to him any fraudulent intent, in delivering a package of this description, without communicating the fact it contained merchandise, was in the nature of concealment, and amounted to a positive representation it contained ordinary personal luggage only. If that be so, there was no bailment and no contract.'

"Where goods have been placed in the carrier's possession without his knowledge and consent, as they were in this case, there can be no contract of bailment. The want of fair dealing on the part of the bailor is a full answer to an action upon any implied contract of bailment for hire. Angell on Carriers, sec. 140; *Batson* v. *Donovon, supra* [4 B. & A. 21].

* * *

"There is nothing in the evidence from which the conclusion could be fairly drawn the company had knowledge of the contents of appellee's trunk, nor was there anything in its appearance that made it the duty of the agents to make inquiry as to what it really contained. Who would suppose a small trunk, which could be readily picked up and carried off by any one,

would be suffered by the owner to be thrown upon the platform, in the nighttime, and treated as baggage of ordinary value, when in fact it contained $30,000 worth of diamonds and costly jewelry? To hold the company liable, in the event loss should occur, for not making investigation as to the contents, would be to extend the responsibility of railway companies to an unprecedented extent beyond anything demanded by any considerations of public policy. The more reasonable rule, and the one best calculated to subserve the ends of justice, is, the passenger, who has the information, should apprise the company of the extraordinary value of the package he desires to have checked as baggage, and, upon failure to do so, if loss ensues, he must bear the consequences.

"Under the most friendly criticism, appellee's conduct savors of legal fraud, not to characterize it by any stronger terms. He is not, therefore, in a position to demand any favorable construction of the evidence. According to the view we have taken, the verdict is contrary to the law and the evidence.

"The judgment of the court below must be reversed."

McKibben v. *Wisconsin Cent. Ry. Co.*, 110 N.W. 964 (Minn. 1907), cited by plaintiff, is, of course, a case taken from another jurisdiction. Moreover, the *McKibben* case is distinguishable in that the sample cases there did not contain articles of unusually great value. The case does not hold that a baggage agent is chargeable with knowledge that a sample case contains articles of *unusually* great value. It merely holds that the baggage agent was chargeable with knowledge that sample cases contain merchandise, not that they contain a fortune in jewelry.

II.

There was no misdelivery by defendant's Red Cap of Mintz' cases; nor, assuming a misdelivery, is there any liability on defendant in the circumstances of this case.

Whether or not a misdelivery took place under the evidence in this case was a question of fact for the trial judge. Rettig's testimony clearly shows that he merely placed the bags in a convenient spot and that he never intended to surrender possession and control of the bags until he received the baggage checks. In the brief moment that he sought help, the stranger posing as Mintz' brother stole the bags. Never, according to Rettig's testimony, did he intend to yield control of the bags without the surrender of the checks. Defendant submits that the specific finding by the trial court that there was no misdelivery of these bags is conclusive on the issue. In his opinion Judge Barnes said:

> "The result of that is that I don't think there was a contract of bailment, and further, what happened when that bag disappeared wasn't any different than though it had been taken off by stealth when the usher wasn't about, not a particle of difference.
>
> "A man came up and said, 'We are not going by train. We are going by automobile. We are going to drive up. My brother is telephoning' and, in effect, he said, 'We want to take those bags out to the cab. We are not going by train.'
>
> "The usher demurred but was persuaded. Here he had a truckload of baggage to go out to the Burlington train, and he thought his customer had changed his mind and didn't want to go by train, so he was torn between a desire to get the baggage to the train and a desire to accommodate these men who had changed their minds and were not going to use the train.

"He was tricked into taking the baggage off his truck. He was tricked into putting it into an automobile, and when he turned around to get somebody to watch the merchandise in the automobile or to take the truck to the Burlington train, the purported brother drove off.

"I can't see a particle of difference in principle, between that and than if that man or some other man had come up, that alleged brother had come up and by stealth, taken the three bags off the truck, not a particle.

"He didn't intend to deliver those bags until he got his checks, and they were stolen from him while he was engaged in a natural effort to accommodate the traveling public." (App. 94).

In all the cases cited by the plaintiff, there was a clear "misdelivery". In the case at bar there was no "misdelivery" but a theft by the stranger as much as if he had picked up the bags in the station and had run away. In order to effect a delivery, (or a misdelivery), there must be a surrender of possession and the yielding of custody and control. In 8 C. J. S. Bailments, sec. 15, p. 249, the rule is stated:

"Such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner and all other persons, give the bailee sole custody and control, make him liable to the owner as the sole custodian of the property in the event of his neglect or fault in discharging his trust with respect to the subject matter, and require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged."

In *Hartley* v. *Robinson*, 78 Ga. 594, 51 S.E. 2d 617, 618 (1949), the court held that placing an automobile at the

disposal of parking lot attendants did not constitute a delivery of a car.

The mere fact that the stranger was given an opportunity to steal the sample cases, did not constitute a delivery to him, any more than if an opportunity had been given by the Red Cap leaving his truck momentarily to deliver other bags into another car of the same train.

Plaintiff's review of the law on misdelivery is impressive on the surface, but the cases cited are inapplicable to the facts in the present case as found by the trial judge. In all the cases cited by plaintiff the bailed article was actually turned over to a third person with the intention of parting with its possession. Perhaps the closest case cited by plaintiff is *Baer* v. *Slater*, 158 N.E. 328 (Mass. 1927), where defendant delivered merchandise to a man posing as an express company employee. The distinction between that case and the instant case is obvious. In the *Baer* case the defendant handed over the bailed article to the impostor and intended that it leave the premises with him. The *Baer* case would be relevant to the instant case only if the defendant there had placed the bailed article on the counter, had said now we will wait for someone to appear with evidence of your authority to claim the article and while the defendant turned away for a moment the impostor had grabbed the bailed article and run from the store. Obviously, on such assumed facts there would have been no misdelivery, just as there was no misdelivery in the instant case.

As a matter of law, moreover, there was no misdelivery by the defendant's Red Cap in this case.

As we have previously shown, there was no bailment of the contents of the sample cases and, hence, defendant was not a bailee of the jewelry.

Crosby v. *20 Fifth Avenue Hotel Co.*, 173 Misc. 604, 17 N.Y.S. 2d 498 (1940).

Stuart v. *D. N. Kelley & Son*, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Barnett v. *Cason*, 124 W.Va. 143, 19 S.E. 2d 621 (1942).

Since there was no delivery of the jewelry by Mintz there could be no misdelivery by the Red Cap.

Moreover, plaintiff ignores Mintz' contributory negligence in failing to inform the Red Cap of the unusual value of the jewelry in his bag. Mintz was a thoroughly seasoned traveler, knew the methods used by Red Caps to distribute baggage, and knew that baggage would necessarily be left unguarded while the Red Cap was carrying out his duties.

In *Roger Wurmser, Inc.* v. *Interstate Hotel Co. of Neb.*, 148 Neb. 660, 28 N.W. 2d 405, 407 (1947) the plaintiff left a bag containing jewelry in the hotel vault. The court denied recovery as a matter of law, stating at 28 N.W.2d 407, 408:

> "From the pleadings it is evident that plaintiff's salesman and employee, Samuel Kutner, at no time, while dealing with the employees of the defendant, informed them of the nature of the contents of his dark brown saddle-leather sample case, being a case about 24 inches long, 16 inches high, and 8 inches wide, marked with the initials 'R.W.,' nor of the value thereof, same allegedly consisting of precious stones of the reasonable wholesale market value of $187,755.04. It is admitted by plaintiff in both its original and reply brief that he did not do so. [p. 407]. . . .
>
> "[3] Following our previous holding we can come to no other conclusion than that the plaintiff is barred from recovery as a matter of law because of its own contributory negligence in the failure of Kutner to inform the defendant's employees that his sample case

contained precious stones of the value of $187,755.04 which failure is obviously more than slight negligence." [p. 408]

Even if we were to concede that a "misdelivery" occurred, as it clearly did not, Mintz' contributory negligence would bar recovery. Plaintiff contends that contributory negligence is irrelevant in a "misdelivery" case and cites *I.&St.L. R.R. Co.* v. *Herndon*, 81 Ill. 143 (1876). That case, however, is an authority for the defendant. The court held that contributory negligence is a defense but that in the particular circumstances the plaintiff's negligence did not contribute to the loss. The court said (81 Ill. 149):

> "Negligence of the plaintiffs, which will prohibit a recovery for an injury sustained by reason of defendant's negligence, must be such as contributes to the injury complained of; that is, it 'must be such, that by the usual course of events, it would result, unless independent, disturbing moral agencies intervene, in the particular injury,' Wharton on Negligence, §324. Whatever negligence plaintiffs may have been guilty of, therefore, in not calling for the trees within a reasonable time, is an element that can have no proper influence in the present case, for no one pretends that its necessary tendency was to induce the defendant's agent to take the law into his own hands, and dispose of the trees to suit his pleasure."

Here the "misdelivery" took place obviously because of Mintz' failure to inform defendant's Red Cap of the presence of highly valuable jewelry in his bags.

III.

Mintz was guilty of gross negligence which caused the loss of the sample cases.

In arguing this point plaintiff ignores the rule of law which provides that the evidence be viewed in the light most favorable to the party in whose favor a judgment is

rendered. Contrary to the statement on page 23 of plaintiff's Brief, Mintz never told the Red Cap that the bags were valuable. In his statement given at Union Station on September 13, 1955, two days after the loss, he did not say that he had told the Red Cap that the bags were valuable (App. 124-130). In the statement to his insurance company made shortly after the loss, he did not say that he had told the Red Cap that the bags were valuable (App. 134-136). Moreover, the Red Cap, Rettig, denied that he knew that the sample cases contained anything of any special value (App. 87). Rettig also related the conversation between himself and Mintz (wholly under cross-examination by plaintiff's attorney) and expressly denied that any such statement was made by Mintz (App. 73-74). Indeed, Mintz' attitude when he handed over his bags is tellingly revealed from the testimony of Rettig (App. 74):

> "A. After giving the gentleman who owned the three bags his receipts, I went into a little bit about the information he would need to claim these bags, and I was told he had made this trip before and it wasn't necessary."

The evidence amply supports defendant's contention that Mintz never mentioned the value of the contents of the sample cases. The trial judge, who had an opportunity to observe Mintz on the witness stand, reached the conclusion set forth at page 93 of the Appendix:

> "Therefore, he did not—and I am just as sure of that as I am sure of anything about this case—tell that red-cap that that bag was valuable. And when he made his statement on the following Tuesday in the Union Station, he didn't say that he said that, and when he presented his statement to the insurance company, he didn't say that he said that."

It was gross negligence on the part of Mintz, knowing as he did the traditional methods used by Red Caps in handling baggage, to turn a fortune in jewelry over to a Red Cap without any indication that the bags contained anything of unusual value. The court below correctly characterized Mintz' conduct in his colloquy with plaintiff's counsel at the conclusion of plaintiff's argument. That colloquy is as follows (Appellee's App. 2a):

> "Mr. Magid: The United States Supreme Court says that. The 73 Illinois and *Perry* vs. *Humphreys*, and the United States Supreme Court say notwithstanding the no notice which exonerates them from liability, that exoneration does not take place when they are guilty of gross negligence, and what is more gross negligence than has been proved in this case on the part of the defendant?
>
> "The Court: I could answer that question for you. You have answered it several times.
>
> "By Mr. Magid: Yes, sir.
>
> "By the Court: Giving a thirty-six thousand dollar bag to a redcap in the Union Station without telling him what it is."

The case relied on by plaintiff (*I. & St. L. R.R. Co. v. Hetudon*, 81 Ill. 143, 149 (1876)) points out that the contributory negligence of a person in Mintz' situation is a bar to recovery if it contributed to the loss. To the same effect is *Roger Wagoner, Inc. v. Interstate Hotel Co. of Neb.*, 148 Neb. 630, 28 N.W. 2d 405, 407 (1947), quoted by defendant in point II of this Brief.

Obviously the failure of Mintz to warn the Red Cap of the fortune in jewelry contained in the sample cases had an effect on the conduct of the Red Cap. The method used by the impostor to get the bags outside the station is a common occurrence in railroad stations and would ordinarily arouse no suspicion. Suspicion would have

been aroused, however, if the Red Cap knew that the samples in the sample cases were actually a fortune in jewelry. On the other hand, no Red Cap would suspect that an elaborate plot would be laid to steal sample cases full of items like tooth brushes, which the Red Cap thought the bags might contain (App. 87). As Judge Barnes concluded, the gross negligence of Mintz caused, or at least contributed to, the loss of the jewelry.

IV.

The Interstate Commerce Act has no application to the case at bar.

This case was tried by both parties on the theory that the law of bailment is applicable and that the law of the State of Illinois is controlling (Appellee's App. 1a, 2a). Moreover, in his closing argument plaintiff's counsel expressly repudiated reliance on the Interstate Commerce Act (Appellee's App. 2a). Since the case was tried solely on the theory that the law of the State of Illinois was controlling, that theory is now the law of the case and there is no merit to plaintiff's contention that it is entitled to recover under the Interstate Commerce Act.

However, there can be no recovery in this case even under that act.

a. Defendant is not a carrier as defined in the Interstate Commerce Act.

It is true that defendant is an agent of the railroads using its facilities. Defendant, however, is not seeking to limit its liability under the provisions of the Interstate Commerce Act.

It is not true that Title 49, Section 1(3) of the United States Code Annotated defines carriers to include "ter-

minals" and "terminal facilities of every kind". Railroads, and not carriers, are so defined. The Act refers to terminal facilities, but not to terminal companies. In the only decision on this question the Appellate Division of the Superior Court of New Jersey has held that a terminal company such as defendant is not a carrier within the meaning of the Interstate Commerce Act. (*Horelick* v. *Pennsylvania R.R. Co.*, 24 N.J.S. 413, 94 A. 2d 685 (1953).) Section 1(3) of that Act makes a distinction between carriers and terminal companies, and, consequently, the defendant here is not a carrier within the purview of Sec. 20 (11) of the Interstate Commerce Act.

On appeal the Supreme Court of the State of New Jersey expressly refused to rule on the question of whether a terminal company is a carrier under the Act. *Horelick* v. *Pennsylvania R. R. Co.*, 13 N.J. 349, 99 A. 2d 652, 654 (1953). Consequently, the lower court's decision still stands, and it is simply untrue that the Supreme Court of New Jersey held that a terminal company such as the Union Station is a carrier within the meaning of the Act.

b. The Interstate Commerce Act is inapplicable where no tariff is relied upon; there is no attempt by the defendant to "limit liability" in this case.

Plaintiff misapprehends both the effect of Sec. 20 (11) and also the defendant's position. The Interstate Commerce Act prohibits *limitation of liability* on property *received* by a carrier unless certain statutory provisos are fulfilled. Limitation of liability refers to an effort by a carrier to limit its liability by special contract in situations where the common law imposes liability. *York Company* v. *Central R. R.*, 70 U.S. 107 (1865). The issue here, however, is not one of limitation of liability. There is no question but that the defendant would be legally liable for *baggage* received by it. Defendant is not seeking to limit its liability

to an arbitrary figure pursuant to a tariff or a limitation contained in a baggage check. The issue here is whether under the law defendant ever *received* the stolen jewelry. There is a further issue here as to whether Mintz' conduct was such as under the law would bar his recovery. The cases are unanimous in holding that defendant under the law of bailments did not receive Mintz' jewelry. The cases further hold that Mintz' conduct was so fraudulent as to prevent recovery.

Both the *Nothnagle* case (346 U.S. 128) and Sec. 20 (11) of the Interstate Commerce Act are inapplicable to this case. In the *Nothnagle* case the carrier attempted to limit liability on baggage to an arbitrary figure of $25.00. The full value of the baggage lost was $681.00. In holding that the statutory requirements for limitation of liability had not been followed, and that the full value of the baggage could be recovered, the court in no way implied that a small fortune in jewelry could be checked as baggage so that the carrier would be liable for its loss.

Moreover, the purpose of the Carmack Amendment is to void any *limitation of liability* on the part of a carrier by tariff, contract or otherwise unless certain statutory requirements are fulfilled. If the statutory requirements are not met, then the liability of the carrier is that at common law. See 13 C.J.S. Carriers, §94, p. 182; see *Nothnagle* v. *N.Y.N.H.&H. R.R. Co.*, 346 U.S. 128, 133 (n. 7) (1953) where the court said that the present Carmack Amendment restored "*the law of full liability as it existed prior to the Carmack Amendment of 1906.*" The law of full liability as it existed prior to 1906 is accurately set forth in the cases of *Michigan Cent. R.R. Co.* v. *Carrow*, 73 Ill. 348 (1874), and *Humphreys* v. *Perry*, 148 U.S. 627 (1893), and those cases control.

It is apparent that plaintiff's entire argument based upon the Carmack Amendment and the *Nothnagle* case are caused by a misunderstanding of the term "limitation of liability". Limitation of liability referred to in the Carmack Amendment and the *Nothnagle* case is simply a right given to the carrier to limit its liability for the loss of baggage to a nominal sum unless a higher fare is paid.

c. Defendant had no obligation to inquire into the nature and value of the contents of Mintz' sample cases.

The argument by plaintiff on this point again results from its confusion with respect to the meaning of "limitation of liability" and of the *Nothnagle* case. Assuming defendant to be a carrier, it posted no tariff. Consequently, the controlling law is the "law of full liability as it existed prior to the Carmack Amendment prior to 1906". *Nothnagle* v. *N. Y. N.H. & H. R.R. Co.*, 346 U. S. 128, 133 (n. 7) (1953). The law of full liability as it existed prior to 1906 and the duties of the carrier thereunder is set forth in *Michigan Cent. R.R. Co.* v. *Carrow*, 73 Ill. 348, 350 (1874):

> "But, conceding it was of such weight and structure as the baggage-master must have known it was a commercial traveler's trunk, he had no reason to suspect that, in addition to the articles usually carried by a traveler, it contained valuable jewelry, comprising a stock equal, if not exceeding, in value that which is commonly kept in a retail store. Appellee presented it as ordinary baggage, and the officer of the company had the right to rely upon the representation, arising by implication, that it contained nothing else. The law imposed no obligation upon him to make any inquiry as to the contents. Had the agent of the company been informed of the contents of the trunk, or had it been so packed that the nature of its contents was discernible, and the company, with

such knowledge, undertook to carry the goods, there is no reason why it would not be liable as a common carrier, and so the authorities hold. But that is not this case. The carrier in this case had no knowledge of the contents of the package, either direct or constructive."

Obviously there is no duty on the part of defendant to inquire as to the value of the contents of Mintz' sample cases. Mintz, however, was under a duty to tell the defendant whether or not his bags contained any items not ordinarily carried as baggage, especially if they were anything of unusual value.

All that the *Nothnagle* case stands for is that, assuming the Carmack Amendment is applicable, a carrier cannot limit its liability for *bona fide baggage* to an arbitrary figure without informing the passenger of that limitation.

CONCLUSION.

Defendant respectfully contends that the decision below was proper and should be affirmed.

Respectfully submitted,

ERWIN W. ROEMER,
Attorney for Appellee.

ERWIN W. ROEMER
JOSEPH P. CARR,
Of Counsel.

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APPELLEE'S APPENDIX.

2 Mr. Magid: This action can be generally described as a bailment action . . .

181 *Cross-Examination of Harry L. Mintz:*

In my experience I have found that red caps accept bags for various cars on the same train, they distribute the bags among the various cars. Some bags might be for my car and some for other cars . . .

286 Mr. Magid: It is also true in this case that under the doctrine of Erie Railroad vs. Tompkins, the law applicable to this case would be the law of the State of Illinois, and the Erie Railroad vs. Tompkins case is 304 U.S. 464 . . .

289 It is the position of the plaintiff from the evidence, the uncontradicted evidence, that the plaintiff has made out a case in bailment . . .

296 Mr. Roemer: I agree with counsel, and the Circuit Court of Appeals has so ruled, that under the doctrine of Erie Railroad vs. Tompkins, it requires the 297 application of the common law of the State of Illinois . . .

366 Mr. Magid: Mr. Roemer has read to your Honor the opinion from the case of Michigan Central Railroad Company vs. Carrow, 73 Ill. 348, and he stated to you, and I agree with him, that that is the law of the 367 state, and the law of the State of Illinois that applies . . .

391 Mr. Roemer: I don't know whether counsel has been attempting to convert this from a State case to an interstate commerce case, because in his opening

statement he said to your Honor this was a bailment case for hire, and he said that again in his closing argument, and yet he is now trying to bring in other theories that it is a gratuitous bailment.

All of us agreed this was a bailment, but it didn't make any difference under the decisions whether it is gratuitous bailment, bailment for hire, as there can be no recovery if there was a failure to notify the redcap or the carrier of the contents of the bag, and there was nothing about that bag that justified the redcap in assuming that it contained $36,000 worth of jewelry as the Plaintiff now contends . . .

393 Mr. Magid: I think in reading these other cases and the comments on whether or not this is an interstate commerce case or a bailment case or a warehouse case, I simply pointed those cases out to your Honor to show even in the tariff cases where there is a liability, limitation of liability, that the Supreme Court has said the passenger does not stand in the same relation to a situation as the railroad company can, because they are in no position to take these matters to Court. The railroad company can protect itself in a much stronger position.

The United States Supreme Court says that. The 73 Illinois and Perry vs. Humphreys, and the United States Supreme Court say notwithstanding the no notice which exonerates them from liability, that exoneration does not take place when they are guilty of gross negligence, and what is more gross negligence than has been proved

394 in this case on the part of the defendant?

The Court: I could answer that question for you. You have answered it several times.

By Mr. Magid: Yes, sir.

By the Court: Giving a thirty-six thousand dollar bag to a redcap in the Union Station without telling him what it is.

PLAINTIFF'S EXHIBITS 6, 7 and 8.

On the reverse side of plaintiff's exhibits 6, 7 and 8 appear the following words:

> "In case of error: conductor will wire station-master stating number of this check; describing baggage; giving name and address of passenger . . ."